



Appl. No. 09/851,040  
Atty. Docket No. 8072M  
Amdt. dated August 6, 2004  
Reply to Office Action of July 7, 2004

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## REMARKS

### State of the Claims

Claims 1-2, 3-23, and 28-29 are pending. No new matter has been added.

### Information Disclosure Statement

The Examiner states that the IDS received on October 3, 2001 fails to comply with the provisions of 37 CFR § 1.97, 1.98 and MPEP § 609 because the three "sample" references do not include a date.

Applicants note that Applicant's Attorney was unable to provide the "publication" dates of the non-patent references because each of the references is a sample of competitive product having its origin outside of the control of Applicant's Assignee, namely, Procter & Gamble. Further, Applicant's Attorney is not privy to the internal release dates of competitive product. That being said then, the only control or knowledge that Applicants can reasonably be expected to hold is to ascertain whether the listed products existed in the public forum before the filing date of Applicants' application. Applicants determined that the listed products were in fact on sale before Applicants' filing date and in proper compliance with 37 C.F.R. § 1.56 listed the products in Applicants' Information Disclosure Statement.

Accordingly, Applicants believe that their IDS should be accepted and deemed proper by the Examiner.

### Elections/Restrictions

Please cancel Claims 24-27 and 30 without prejudice.

### 35 U.S.C. § 112 Rejection

Claims 1-3, 5-23 and 28-29 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicants regard as their invention.

In Claims 1-3, 5-23 and 28-29 the Examiner states that the claims recite the terms "snack pieces" as well as the terms "a snack piece"--it is not clear to the Examiner whether the terms are the same or different snack pieces.

Multiple claims have been amended to remove the ambiguity between the terms "snack pieces" and "a snack piece". No new matter has been added. Applicants believe that the Examiner's concerns have been met and therefore respectfully request reconsideration and allowance of Claims 1-3, 5-23 and 28-29 over this portion of the Examiner's 35 U.S.C. § 112, second paragraph, rejection.

The Examiner states that Claim 5 is dependent upon canceled Claim 4, and that it is therefore not clear which claim Claim 5 should depend from.

Applicants point out that in their response dated October 16, 2003, Claim 5 was properly amended to change its dependency from now-canceled Claim 4 to Claim 1. Applicants respectfully request that the Examiner review Applicants' submission on the above date to confirm this amendment.

Given that Applicants have already made the proper amendment to Claim 5 thus changing its dependency from now-canceled Claim 4 to Claim 1, Applicants request reconsideration and allowance of Claim 5 over the Examiner's 35 U.S.C. § 112, second paragraph, rejection.

In Claim 6, the Examiner states that the limitation "said body" is recited therein and lacks the proper antecedent basis therefor.

Applicants have amended Claim 6 and removed the antecedent basis issue noted by the Examiner. No new matter has been added. Applicants therefore believe that the Examiner's issue has been resolved and respectfully request reconsideration and allowance of Claim 6 over the Examiner's 35 U.S.C. § 112, second paragraph, rejection.

Regarding Claim 12, the Examiner states that it is not clear what level or degree of variation in size and shape would be considered to be consistent and thus rejects Claim 12 because of its use of the term "consistent in size and shape", i.e., of the snack pieces.

Applicants point out that the term "consistent", which seems to be the term in dispute, means to be marked by regularity or steady continuity and also to be free from variation.<sup>1</sup> Also, Figures 5 and 6 of Applicants' specification clearly show two of Applicants' snack pieces which are consistent in size and shape. Applicants' therefore believe that any lack of clarity on the Examiner's part is readily removed when the Examiner considers 1) Applicants' regular use of the word "consistent" and 2) Applicants' Figures 5 and 6 which clearly show two of Applicants' snack pieces of consistent size and shape.

Applicants therefore respectfully request reconsideration and allowance of Claim 12 over the Examiner's 35 U.S.C. § 112, second paragraph, rejection.

**35 U.S.C. § 103 Rejection**

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<sup>1</sup> Merriam Webster's Collegiate Dictionary 10<sup>th</sup> Edition, 1996, page 247.

Claims 1-3, 8-15 18-23 and 28-29 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Szwerc (U.S. Patent No. 4,844,919--hereinafter Szwerc '919) in view of Applicants' Admitted Prior Art (hereinafter AAPA).

The Examiner asserts that Szwerc '919 teaches snack pieces comprising consistent concave-curved pieces with random surface features and then cites Figures 1-3 of Szwerc '919 as evidence of the presence of the random surface features. The Examiner cites the AAPA as evidence of non-planar snack pieces in a nested arrangement.

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference must teach or suggest all of the claim limitations.<sup>2</sup>

Applicants respectfully disagree with the Examiner's contentions and assert that the Examiner has failed to present a *prima facie* case of obviousness against Applicants' claims using the combination of Szwerc '919 in view of the AAPA.

Applicants assert that the Szwerc/AAPA combination does not teach or suggest Applicants' random surface features. Rather, Szwerc '919 teaches a fused, substantially continuous particulate flavored topping composition (2)--see Figures 1-3.<sup>3</sup> The continuous particulate flavored topping composition of the Szwerc/AAPA combination directly teaches away from Applicants' invention. In their specification, Applicants state the following: "The definition of random surface features as found in the present invention do not include patterned surface features such as those found in Ridges®."<sup>4</sup> In describing these types of surface features,

Applicants note that these surface features are a continuous pattern.<sup>5</sup> As noted above, Szwerc '919 provides a continuous topping composition.

Applicants contend therefore first that the so-called surface features found in the Szwerc/AAPA combination are not Applicants' random surface features. Rather they are a continuous layer laid on top of the smooth surface of the snack pieces of the combination.

Applicants further contend that even if the continuous layer could be interpreted as providing surface features to the snack pieces of the Szwerc/AAPA combination, it would still not teach Applicants' random surface features, and in fact would teach away from Applicants'

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<sup>2</sup> In re Vaeck, 947 F. 2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

<sup>3</sup> Szwerc (U.S. Patent No. 4,844,919); col. 4, lines 46-49.

<sup>4</sup> Applicants' Specification; page 20, lines 27-29.

<sup>5</sup> Id. at page 20, lines 24-25.

invention since Applicants have specifically disclaimed continuous layers as exclusively taught by Szwerc '919 in the Szwerc/AAPA combination.

Thus, Applicants respectfully request reconsideration and allowance of Claims 1-3, 8-15, 18-23 and 28-29 over the Examiner's 35 U.S.C. § 103(a) rejection under Szwerc '919 in view of the AAPA.

Claims 1, 3, 8-13, 15, 18-19, 21-22 and 28 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Szwerc '919 in view of Carey, et al. (U.S. Patent No. 5,747,092--hereinafter Carey '092).

As noted above, Szwerc '919 teaches away from Applicants' invention by use of their continuous, and not random, topping layer on the snack pieces of the Szwerc/Carey combination. Applicants assert that no combination of references with Szwerc '919 cures this defect and that the Examiner has not properly met the burden of proving a prima facie case of obviousness against Applicants' claims.

Therefore, Applicants respectfully request reconsideration and allowance of their Claims 1, 3, 8-13, 15, 18-19, 21-22 and 28 over the Examiner's 35 U.S.C. § 103(a) rejection under Szwerc '919 in view of Carey '092.

Claims 5-7 and 16-17 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Szwerc '919 in view of the AAPA, as applied herein previously, and further in view of Fink, et al. (U.S. Patent No. 6,129,939--hereinafter, Fink '939).

As noted above, Szwerc '919 teaches away from Applicants' invention by use of their continuous topping layer on the snack pieces of the Szwerc/AAPA/Fink combination. Applicants assert that no combination of references with Szwerc '919 cures this defect and that the Examiner has not properly met the burden of proving a prima facie case of obviousness against Applicants' claims.

Therefore, Applicants respectfully request reconsideration and allowance of their Claims 5-7 and 16-17 over the Examiner's 35 U.S.C. § 103(a) rejection under Szwerc '919 in view of the AAPA and further in view of Fink '939.

Claims 5-7 and 15-19 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Szwerc '919 in view of Carey '092 and further in view of Fink '939.

As noted above, Szwerc '919 teaches away from Applicants' invention by use of their continuous topping layer on the snack pieces of the Szwerc/Carey/Fink combination. Applicants assert that no combination of references with Szwerc '919 cures this defect and that the Examiner has not properly met the burden of proving a prima facie case of obviousness against Applicants' claims.

Therefore, Applicants respectfully request reconsideration and allowance of their Claims 5-7 and 15-19 over the Examiner's 35 U.S.C. § 103(a) rejection under Szwerc '919 in view of Carey '092 and further in view of Fink '939.

Claims 2, 14, 20, 23 and 29 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Szwerc '919 in view of Carey '092 as applied herein previously and further in view of the AAPA.

As noted above, Szwerc '919 teaches away from Applicants' invention by use of their continuous topping layer on the snack pieces of the Szwerc/Carey/AAPA combination. Applicants assert that no combination of references with Szwerc '919 cures this defect and that the Examiner has not properly met the burden of proving a *prima facie* case of obviousness against Applicants' claims.

Therefore, Applicants respectfully request reconsideration and allowance of their Claims 2, 14, 20, 23 and 29 over the Examiner's 35 U.S.C. § 103(a) rejection under Szwerc '919 in view of Carey '092 and further in view of the AAPA.



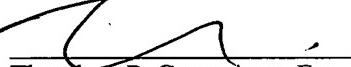
**SUMMARY**

All of the rejections in the Office Action have been discussed as have the distinctions between the cited references and the claimed invention.

In light of the discussions and amendments contained herein, Applicants respectfully request reconsideration of the rejections and their withdrawal, and all of the claims allowed.

Issuance of a Notice of Allowance at an early date is earnestly solicited.

Respectfully submitted,  
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August 6, 2004  
Customer Number 27752